

**DEPARTMENT OF STATE REVENUE**

LETTER OF FINDINGS NUMBER: 01-0135

SALES AND USE TAX

FOR TAX PERIODS: 1997-1999

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**1. Sales and Use Tax: Services With Tangible Personal Property**

**Authority:** IC 6-2.5-2-1, IC 6-2.5-3-2, IC 6-8.1-5-1 (b), 45 IAC 2.2-4-2 (a).

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The taxpayer protests the imposition of charges for certain marketing services.

**Statement of Facts**

The taxpayer is an Indiana corporation that sells automobiles. Additional use tax and interest were assessed after a routine audit. The taxpayer protested a portion of the assessment and a hearing was held by telephone. Further facts will be provided as necessary.

**1. Sales and Use Tax: Services With Tangible Personal Property**

**Discussion**

Throughout the tax period the taxpayer contracted for the purchase of marketing services with tangible personal property from one firm. The Indiana Department of Revenue assessed use tax on these purchases. The taxpayer contends that these were actually purchases of services that are not subject to the use tax.

Indiana imposes a gross retail tax on the sales of tangible personal property by retail merchants in Indiana. IC 6-2.5-2-1. Indiana imposes a complementary tax on the use of tangible personal property purchased in a retail transaction. IC 6-2.5-3-2. There is no statutory provision imposing a gross retail tax on services. The tax implications of a sale that includes both services and the sale of tangible personal property are clarified at 45 IAC 2.2-4-2 (a) as follows:

Professional services, personal services, and services in respect to property not owned by the person rendering such services are not "transactions of a retail merchant constituting selling at retail", and are not subject to gross retail tax.

Where in conjunction with rendering professional services, personal services, or other services, the serviceman also transfers tangible personal property for a consideration, this will constitute a transaction of a retail merchant constituting selling at retail unless:

- (1) The serviceman is in an occupation which primarily furnishes and sells services, as distinguished from tangible personal property:
- (2) The tangible personal property purchased is used or consumed as a necessary incident to the service:
- (3) The price charged for tangible personal property is inconsequential (not to exceed 10%) compared with the service charge; and
- (4) The serviceman pays gross retail or use tax upon the tangible personal property at the time of acquisition.

All tax assessments are presumed to be accurate and the taxpayer bears the burden of proving that any assessment is incorrect. IC 6-8.1-5-1 (b).

The taxpayer contracts to purchase direct marketing promotions from the vendor. The invoices represent the total cost of the services and tangible personal property transferred in the performance of the service. Based on their market research, the vendor targets a specific demographic and conducts a sale on the taxpayer's premises. One of the vendor's representatives is responsible to plan the sale, attend the sale, register guests, monitor the progress of the sale, determine if a prize has been won and follow up with all the people who attended the sale. During the process of the contest, the vendor mails printed forms to the persons in the targeted demographic. These forms include papers that resemble 1099s, checks, patriotic documents and Internal Revenue Service refund checks and constitute the tangible personal property transferred with the performance of the service.

The vendor considers the transaction the sale of a service and pays use tax on the tangible personal property used in the provision of the service.

The vendor provided the following cost breakdown of the direct marketing promotions.

	1999	1998	1997
Postage	1700	1700	1350
Printing	100	100	100
Prize Insurance	350	350	350
Gifts	200	200	200
Coordinator	200	100	0
Labor	400	400	400
List & Data Research	950	950	950
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Total Promotion Cost	3900	3800	3350

The only tangible personal property transferred in each transaction was the category of gifts and printed materials. These gifts were the mock checks and other documents mailed to the target demographic to promote the sale. In each transaction, the cost of the tangible personal property transferred was significantly below ten per cent (10%) of the total cost of the transaction. The remainder of the costs was clearly related to the provision of the vendor's personal services to the taxpayer.

In each of these transactions, the vendor transfers tangible personal property for a consideration along with the provision of a service. Pursuant to the previously cited Regulation, this would transform the provision of the service into a taxable sale by a retail merchant unless four conditions are met. First, the vendor in this situation is in an occupation that primarily furnishes services, direct marketing productions. The tangible personal property, the gifts, is used as a necessary incident to the service. Thirdly, the price charged for the gifts is inconsequential, less than ten per cent (10%) of the total cost. Finally, the vendor pays tax on the tangible personal property that is transferred with the provision of the service. In this situation, each of the four conditions is met. Therefore the taxpayer's purchase of direct marketing promotions is a non-taxable purchase of a service.

### **Finding**

The taxpayer's protest is sustained.

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